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The Honorable John R. Ruhl
Hearing Date: December 13, 2019
Hearing Time: 9:30 a.m.
With Oral Argument

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF

255 SOUTH KING STREET
LIMITED PARTNERSHIP, a
Washington limited partnership; 618
SECOND AVENUE LIMITED
PARTNERSHIP, a Washington limited
partnership; 1000 1ST AVENUE
LIMITED PARTNERSHIP, a
Washington limited partnership; and
1016 1ST AVENUE LIMITED
PARTNERSHIP, a Washington limited
partnership,

Plaintiffs,

vs.

CITY OF SEATTLE, a Washington
municipal corporation,

Defendant.

EUGENE A. BURRUS and LEAH S.
BURRUS, husband and wife and the
marital community comprised thereof;
WILLIAM J. JUSTEN and SANDRA L.
JUSTEN, husband and wife and the
marital community comprised thereof;
THEODORE T. TANASE and
PRISCILLA B. TANASE, husband and
wife and the marital community
comprised thereof; DAVID STARR, an
individual; VASANTH PHILOMIN and
KARIN PHILOMIN, husband and wife
and the marital community comprised
thereof; DANIEL TUPPER and

No. 19-2-05733-5 SEA

(Consolidated with No.
19-2-08787-1 SEA)

**PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT REGARDING
EX PARTE VIOLATIONS,
VIOLATIONS OF THE
QUASI-JUDICIAL RULES,
AND FAILURE TO
PROVIDE TIMELY
NOTICE TO PROPERTY
OWNERS**

No. 19-2-08787-1 SEA
(Judge Ken Schubert)

PATRICIA TUPPER, husband and wife and the marital community comprised thereof; JOHN DRINKARD and JANET DRINKARD, husband and wife and the marital community comprised thereof; FRANK KATZ and ELISE KATZ, husband and wife and the marital community comprised thereof; DEBORAH BOGIN COHEN and RICHARD B. OSTERBERG, Trustees of the ZVI Cohen Family Trust; JOHN A. BATES and CAROLYN CORVI, husband and wife and the marital community comprised thereof; HARVEY ALLISON and MEI WENG ALLISON, husband and wife and the marital community comprised thereof; VICTOR C. MOSES and MARY K. MOSES, Trustees under the 2007 Moses Trust; NANCY E. DORN and CAROL A. VERGA, a married couple; ALEXANDER W. BRINDLE, SR., an individual; TOM H. PEYREE and SALLY L. PEYREE, Trustees of The Thomas H. Peyree and Sally L. Peyree Revocable Trust; ANTON P. GIELEN and KAREN N. GIELEN, husband and wife and the marital community comprised thereof; KEITH PAUL KLUGMAN and MAGDERIE KLUGMAN, husband and wife and the marital community comprised thereof; ANDREW P. MARIN and CYNTHIA J. MARIN, Trustees of The Andrew P. Marin and Cynthia J. Marin Family Revocable Trust; DANIEL S. FRIEDMAN and MYRA A. FRIEDMAN, husband and wife and the marital community comprised thereof; HOLLY MORRIS, an individual; and RONALD EVAN WALLACE, an individual,

Plaintiffs,

vs.

CITY OF SEATTLE, a Washington municipal corporation,

Defendant.

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E. The disclosure contained insufficient information and did not satisfy the Appearance of Fairness Doctrine. 24

F. The City’s disclosures lacked “substance.” 24

G. The City Council’s late disclosure and refusal to allow comment prevented any rebuttal. 25

H. Waterfront LID Ordinance 125760 should be invalidated and remanded to the City Council. 26

I. The City Council’s Failure to follow its own Quasi-Judicial Rules violated the Appearance of Fairness Doctrine. 27

1. The Hearing Examiner, City Council Committee, and full City Council did not create Findings, Conclusions, and Recommendations as required. 27

2. Notice was never provided to affected property owners. 28

J. This Court should invalidate Waterfront LID Ordinance 125760 and remand to the City Council. 29

VI. CONCLUSION 29

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I. RELIEF REQUESTED

Plaintiffs seek partial summary judgment invalidating the Waterfront Local Improvement District (“Waterfront LID”) and remanding the matter back to the decision-maker, the Seattle City Council (“City Council”) for a proper public hearing and re-vote. Plaintiffs are tax assessed residential and commercial property owners within the City of Seattle’s (“City”) proposed Waterfront LID, which was created in violation of Washington State’s Appearance of Fairness Doctrine. The Appearance of Fairness Doctrine and its corresponding Quasi-Judicial Rules apply to legislative bodies “when adjudicating an individual’s rights and land and it prevents undue influence.”¹ Under this Doctrine, evidence of prejudgment or ex parte communications may invalidate the action. Specifically, the decision-maker cannot communicate ex parte with opponents or proponents of the Waterfront LID unless during a public hearing. When a Councilmember engages in ex parte communications, he or she must disclose the “substance” of such violations and provide an opportunity for the affected parties to rebut the communications. Failure to properly disclose ex parte communications is fatal to the pending action.

Here, the City Council violated the Appearance of Fairness Doctrine when it: (i) prejudged the outcome of the Waterfront LID vote; (ii) failed to disclose all ex parte communications; (iii) failed to provide the “substance” of the ex parte violations; (iv) failed to provide Plaintiffs a meaningful opportunity to know of, analyze, or rebut those violations; and (iv) failed to follow its own Quasi-Judicial Rules.

While deliberating on the Waterfront LID, the City Council expressly adopted and used a “Quasi-Judicial” process. As explained above, the Quasi-Judicial process bars plaintiffs and the general public from communicating off-the-record with the City Council. This means the City Council intentionally prohibited itself from interacting with proponents or opponents of the Waterfront LID, unless at a public meeting. However, behind closed doors, the City Council

¹ *Decl. Werner*, Ex. 1, p. 3.

1 frequently met with proponents from the Office of the Waterfront to receive private one-sided
2 briefings about Waterfront LID “facts.”² Just one day before the Waterfront LID vote, the City
3 Council released an “Appearance of Fairness” Memorandum (“Ex Parte Memo”), attempting to
4 disclose the nature and extent of its ex parte violations as required by applicable law. This
5 disclosure fell short. In its last-minute Ex Parte Memo, the City Council only included a select
6 few ex parte violations, did not provide any substance or meaningful detail about the violations
7 as required by law, and refused Plaintiffs adequate notice and time to rebut the vaguely
8 identified ex parte violations.

9 This Court should invalidate Ordinance 125760, which created the Waterfront LID, and
10 remand the matter back to the City Council for proceedings consistent with the Appearance of
11 Fairness Doctrine, including: (i) the preparation of a corrected Ex Parte Memo; (ii) a new public
12 hearing before an independent Hearing Examiner to report recommendations; (iii) complete
13 written findings, conclusions and recommendations; and (iv) conduct a new vote on the
14 proposed Waterfront LID.

15 II. STATEMENT OF FACTS

16 A. The Waterfront LID finances six specific Central Waterfront projects.

17 The Waterfront LID is a funding source for six specific Central Waterfront projects
18 (“LID Improvements”): the Promenade, Overlook Walk, Pioneer Square Street Improvements,
19 Union Street Pedestrian Connection, Pike/Pine Streetscape Improvements, and Waterfront Park
20 Pier 58 rebuild. Specifically, on the map below, the LID Improvements are represented by
21 orange lines, while the City-proposed LID boundary (“Recommended Waterfront LID
22 Boundary”) is represented by the expansive, unshaded shape surrounding the orange line.³ All
23 Plaintiffs in this matter own property within the Recommended Waterfront LID Boundary.⁴

24
25 _____
26 ² *Id.*, pp. 12-16.

27 ³ *Decl. Lance*, Ex. 1, Exs. A and B.

⁴ Plaintiffs ask the Court to take judicial notice of this fact, as proven by Plaintiffs’ corresponding property records available at the King County Assessor’s office.



B. LIDs are created under RCW Chapter 35.43 and must generate “special benefit.”

When a government creates a local improvement district under RCW Chapter 35.43, it may only assess properties that are “specially benefitted” by the implemented government improvements.⁵ A “special benefit” is the increase in value of the properties appurtenant to the government improvement (above the baseline value of the properties without the government improvement).⁶ An LID boundary is limited to those properties “specially benefitted.” Where the special benefit ends, the LID boundaries also must end.⁷ Further, the benefit to the land must be “actual, physical, and material.”⁸

In this case, the Waterfront LID’s “special benefit” must exclusively relate to the six specific LID Improvements. Currently, the Recommended Waterfront LID Boundary – the land alleged to be “specially benefitted” – extends nearly a mile and a half away from the LID Improvements. Notwithstanding the breadth of the Recommended Waterfront LID Boundary, in November 2016, the City’s independent appraiser Valbridge Property Advisors (“Valbridge”),

⁵ RCW § 35.43.050, .130; *United States v. 2,477.79 Acres of Land*, 259 F.2d 23, 28 (5th Cir. 1958).

⁶ *Id.*

⁷ *Heavens v. King Cty. Rural Library Dist.*, 66 Wn.2d 558, 564, 404 P.2d 453 (1965).

⁸ *Id.* at 563.

1 found that only properties “within a three-block radius of parks that offer views and public
2 amenities” can create a “positive effect” and “measurable impacts” on “property values.”⁹ In
3 analyzing the feasibility of the Waterfront LID, Valbridge wrote:

4
5 **Summary:**

6 Based on our preliminary research discussed within this executive summary, it is clear
7 that well-designed park and street improvement projects have a positive effect on their
8 surrounding neighborhoods and property values. Many of the studies mentioned above
9 can clearly define measurable impacts on property values within a three block radius of
10 parks that offer views and public amenities. These projects are shown to increase

11 In addition, world renowned urban planners commented that the proposed surface
12 roadway, an LID Improvement, would not only create a poor environment for pedestrians, but
13 also not be used by downtown residents any more than previously used.¹⁰ Gehl Architects, the
14 firm engaged by the State of Washington, King County, and the City of Seattle to evaluate the
15 deep bore tunnel option, a part of the LID Improvements, commented:

16 **SUMMARY OF SCENARIO EVALUATIONS**

- 17 • NONE OF THE SCENARIOS OFFER A STRATEGY THAT TAKES FULL AD-
18 VANTAGE OF SEATTLE'S KEY STRENGTHS.
- 19 • NONE OF THE SCENARIOS PROPOSE AN OVERALL POSITIVE PEDESTRI-
20 AN ENVIRONMENT, TAKING BOTH WATERFRONT AND DOWNTOWN INTO
21 ACCOUNT.
- 22 • NONE OF THE SCENARIOS CREATE A NICE WATERFRONT AT A GOOD
23 HUMAN SCALE THAT IS POSSIBLE TO ACTIVATE WITH HUMAN LIFE.

24
25
26 ⁹ Decl. Lance, Ex. 2, VB_LID_0000010.

27 ¹⁰ Decl. Lance, Ex. 28, pp. 37, 40; Ex. 29, p. 5.

1 In 2013, HR&A Advisors conducted a Waterfront Downtown Visitation Study about the LID
2 Improvements and wrote:

- 3
- 4 ▪ Based on length of stay data from a comparable waterfront park (Brooklyn Bridge Park), HR&A
5 assumes metropolitan residents from outside of downtown will spend two hours each in the park
6 and park vicinity – 0.11 net new visitor days per resident. HR&A also assumes that downtown
resident park visitors will spend no net new time in downtown; this assumption is conservative, as it
assumes that downtown residents themselves will not spend additional time and money in their own
neighborhood.

7 In sum, it is questionable whether the “special benefits,” if any, extend nearly as far as the City
8 Council plans to assess. These are critical facts of which the City Council must be aware, and
9 of which Plaintiffs have a right to analyze.

10 C. The City Council spends money it does not have on waterfront planning for
11 years.

12 As early as 2011, the City began spending against the still non-existent Waterfront LID
13 funds, by internally loaning funds from the City’s Transportation Master Fund.¹¹ In 2013, the
14 City Council declared its intention to pay back this debt with the money collected from the
15 Waterfront LID.¹² By 2017, the City Council re-declared its intent to form the Waterfront LID
16 as part of the Waterfront Strategic Plan.¹³ In the following year, the City Council passed the
17 formal Resolution of Intent to form the Waterfront LID.¹⁴ Today, according to 2020 budget
18 documents recently released, the City Council plans to borrow another \$19 million against
19 Waterfront LID funds, escalating spending against the \$160 million Waterfront LID to nearly
20 \$50 million.¹⁵ For at least eight years, the City Council has anticipated and relied upon
21 formation of the Waterfront LID to cover budget shortfalls. The Waterfront LID was pre-
22 approved by the City Council for years prior to voting on Ordinance 125760. The City Council,
23 as the decision maker, prohibited from meeting privately during the Quasi-Judicial process.
24 Despite this, the City Council acts more like a proponent of the Waterfront LID.

25 ¹¹ *Id.*, Ex. 1, § 12.c; Ex. 3.

26 ¹² *Id.*, Ex. 1, § 12.d.

27 ¹³ *Id.*, Ex. 4.

¹⁴ *Id.*, Ex. 5.

¹⁵ *Id.*, Exs. 6-7.

1 D. Though it relied upon the Waterfront LID as a funding source for years, the City
2 Council did not take adequate care in its planning and development.

3 The Waterfront LID planning falls short of a well-managed project – as evidenced by¹⁶
4 Councilmembers who remained uninformed about basic elements of the plan. In 2016, the City
5 completed part of its State Environmental Policy Act (“SEPA”) review for four of the six LID
6 Improvements with the publication of its Final Environmental Impact Statement regarding the
7 Alaskan Way, Promenade, and Overlook Walk (“AWPOW FEIS”).¹⁷ Three groups appealed
8 the AWPOW FEIS to the Hearing Examiner, expressing significant concern with the eight-lane
9 roadway, loss of parking, and building impacts from changed road designs.¹⁸ The City settled
10 out of court with them. According to the City’s discovery answers, it had “no duty to inform
11 City Councilmembers and their staff about the outcome of SEPA appeals.”¹⁹ This prevented
12 Councilmembers from receiving information about the designs and their impacts.

13 Councilmembers that did not receive environmental review briefings apparently “had
14 not expressed interest in the topic,”²⁰ despite unwavering support of the funding source, the
15 Waterfront LID. This gap in knowledge is highlighted by Councilmembers Johnson and
16 Bagshaw’s testimony just prior to the vote that the new space would be “for pedestrians” “as
17 opposed to a place . . . for cars.”²¹ It would be “green,” not “gray.”²² In reality, the LID
18 Improvements are adjacent to an eight-lane boulevard, not open green space.
19

20

¹⁶ Only Councilmember Gonzalez was absent on January 28, 2019.

21 ¹⁷ *Decl. Lance*, Ex. 8.

22 ¹⁸ *Id.*, Ex. 30.

23 ¹⁹ *Decl. Franklin*, Ex. 3, pp. 17, 19; *Compare* SMC 25.05.800.Q, which states that ordinances establishing
24 “[l]ocal improvement districts and special purpose districts” are subject to SEPA review if “such
25 formation constitutes a final agency decision to undertake construction of a structure or facility not
26 exempted under §§ [25.05.800](#) and [25.05.880](#),” such as minor construction and emergencies. Here, the LID
27 Improvements are described as “major,” Ordinance 125760 “orders” completion of the improvements,
and “all budget and finance approvals . . . are complete.” *Decl. Lance*, Ex. 23, AWPOW FEIS, p. 5
(Kubly-Foster cover letter); *Id.*, Ex. 1, Ordinance 125760, pp. 1, 5; *Decl. Franklin*, Ex. 3, Plaintiffs’
Second Interrogatories to the City and Answers Thereto, p. 23.

²⁰ *Decl. Franklin*, Ex. 3, pp. 19 and 21.

²¹ *Decl. Werner*, Ex. 2, pp. 18 and 21.

²² *Id.*, p. 18.

1 Additionally, major LID Improvements like the Pike/Pine Corridor and Waterfront Park
2 Pier rebuild are not yet at 30% design and are just beginning what is expected to be a long,
3 complex, multi-year permitting and approval process.²³ The Waterfront LID appears years away
4 from most construction contracts and final assessments. As a result, there remains ample time to
5 remand the matter to the City Council for proper proceedings.

6 E. An LID is created by property owner petition or by local government ordinance.

7 Local improvement districts are created in one of two ways: either by petition of
8 property owners representing a majority of the value of the assessments, or by City Council
9 resolution and ordinance.²⁴ A resolution-created LID and ordinance cannot proceed if property
10 owners representing 60% of the assessed value protest its creation.²⁵ Without adequate support
11 from property owners to petition the Waterfront LID's creation, the City Council was forced to
12 compel the Waterfront LID through the resolution method and ordinance, or find another
13 solution for its \$30 million LID debt. It chose to press on with the Waterfront LID by resolution
14 and ordinance.

15 To do so, the City Council follows this procedure: first, the passage of a Resolution of
16 Intent to "initiate a legislative process and formal public discussion;" second, preliminary
17 assessments and notice thereof; third, notice and formal public hearing and comment led by a
18 Hearing Examiner ("HE Hearings"); fourth, a City Council Committee review of the Hearing
19 Examiner's LID Report and Council Committee recommendation to the full City Council; fifth,
20 full City Council vote and adoption of the ordinance ("Formation Hearing" and "Formation
21 Ordinance"); and finally, a Final Assessment Hearing and adoption of the Final Assessment
22 Roll. Today, the City Council has completed the fifth step, through the adoption of Waterfront
23 LID Formation Ordinance 125760.

24
25
26 ²³ *Decl. Lance*, Ex. 9.

27 ²⁴ RCW §§ 35.43.070; 35.43.120.

²⁵ RCW § 35.43.180.

1 F. The City Council chose a quasi-judicial process for its review of the City's
2 proposed Waterfront LID.

3 In May 2018, prior to the first step, the Resolution of Intent, Jack McCullough wrote an
4 open letter to the City Council, where he noted staff were incorrectly arguing that an “absence
5 of vocal opposition to the LID” should be read as an endorsement and warned City
6 Councilmembers not to interpret silence as an “endorsement.”²⁶ Nevertheless, the City Council
7 passed the Resolution of Intent to form the Waterfront LID. And in doing so, the City Council
8 expressly elected to abide by the Appearance of Fairness Doctrine and comply with its Quasi-
9 Judicial Rules.²⁷ The Quasi-Judicial Rules implement the Appearance of Fairness Doctrine and
10 apply to City Council action’s “adjudicating an individual’s rights and land.”²⁸ These laws and
11 rules require that the City Council refrain from ex parte communications with opponents or
12 proponents of the Waterfront LID.²⁹ In addition, both require that specific procedures be
13 followed by the Hearing Examiner, Council Committee, and full City Council. Notably, these
14 procedures require: that the Hearing Examiner “report recommendations” to the Council
15 Committee; that the Council Committee make written findings of fact, conclusions of law, and
16 recommendations to the full City Council.³⁰ After that, the full City Council must adopt these
17 findings and conclusions at the formation vote, and then mail a copy of the decision to the
18 affected parties.³¹

19 G. The Seattle City Council appoints the Seattle Hearing Examiner to conduct the
20 initial Waterfront LID public hearings.

21 The HE Hearings occurred from July 13th to July 28th of 2018 and were conducted by
22 the Seattle Hearing Examiner.³² These HE Hearings provided the first formal opportunity for
23 property owners and the general public to voice their opinions about the Waterfront LID. These

24 ²⁶ *Decl. Franklin*, Ex. 6.

25 ²⁷ *Decl. Lance*, Ex. 5.

26 ²⁸ *Decl. Werner*, Ex. 2, p. 3.

27 ²⁹ *Decl. Lance*, Ex. 11, QJ Rules § I.A.

³⁰ *Id.*, Ex. 11, QJ Rules § IV.B.1-2.

³¹ *Id.*, Ex. 11, QJ Rules §§ VII and VIII.D.

³² http://clerk.seattle.gov/~CFS/CF_320972.pdf, Seattle Clerk’s File (CF) 320972, Report of the Hearing Examiner.

1 HE Hearings are for the Hearing Examiner to hear testimony and “**report recommendations**
2 **on the resolution to the legislative authority for final action.**”³³ As it turns out, the HE
3 Hearings were rich with dialogue, where at least 284 distinct comments from concerned
4 individuals created a 1,094 page record.³⁴

5 Following the HE Hearings, the Hearing Examiner produced the “Report of the Hearing
6 Examiner for the City of Seattle” regarding the Resolution 31812 of Intent to Form the
7 Waterfront LID (“Hearing Examiner LID Report”). The Hearing Examiner LID Report
8 summarizes and comments upon the public testimony.³⁵ However, the Hearing Examiner LID
9 Report did not “report recommendations” as required by law.³⁶ Instead, it simply listed the
10 public comments and passed them to the Council Committee.³⁷ Thereafter, without mailing
11 notice to the affected property owners,³⁸ the City Council held at least four additional public
12 meetings on the Waterfront LID: (1) September 17, 2018, (2) January 16, 2019, (3) January 24,
13 2019, and (4) January 28, 2019.³⁹ Surprisingly, and unknown to Plaintiffs, the City Council met
14 with the Office of the Waterfront and other proponents several times behind closed doors prior
15 to the vote approving the Waterfront LID.

16 H. The Friday and Sunday before the Monday vote, several ex parte violations
17 come to light.

18 On Friday, January 25, 2019, the City Council released its Ex Parte Memo attempting to
19 correct its clear violations of the Quasi-Judicial Rules.⁴⁰ The Ex Parte Memo disclosed 14
20 briefings and communications with the Office of the Waterfront, amounting to double the
21 number of public meetings.⁴¹ The Ex Parte Memo provided the topic of the communications,
22

23 ³³ *Id.*, p. 1 (citing RCW § 35.43.140 with emphasis by Hearing Examiner).

24 ³⁴ *Id.*, p. 4.

25 ³⁵ *Id.*, pp. 1-16.

26 ³⁶ *Id.*

27 ³⁷ *Decl. Lance*, Ex. 13.

³⁸ *Decl. of Larry Ice at ¶6.*

³⁹ *Decl. Lance*, Ex. 13.

⁴⁰ *Id.*

⁴¹ *Id.*, Attachment 1.

1 but no other detail, substance, or materials related to the content of the violations.⁴² The
2 inadequate disclosure of the topics with no substance, attendees or attached materials looked
3 like this:

4 November 6 – 15, 2018

5 The following briefings to Councilmembers centered on the Waterfront Legislative Package, which includes the LID Formation ordinance; the
6 Funding, Operations and Maintenance ordinance; and the LID Protest Waiver Agreement Ordinance. At the time, the LID Protest Waiver
Agreement had not been completed and the briefings focused on the concept of the agreement, commitments from property owners, and
potential commitments from the City.

7

Meeting Date	Councilmember
11/15/2018	CM Sawant's staff
11/6/2018	CM Gonzalez
11/6/2018	CM Bagshaw
11/6/2018	CM Mosqueda
11/6/2018	CM O'Brien/CM Johnson

8
9

10 December 20, 2018 – January 17, 2019

11 The following briefings to Councilmembers centered on the Waterfront Legislative Package, which includes the LID Formation ordinance; the
Funding, Operations and Maintenance ordinance; and the LID Protest Waiver Agreement Ordinance. Specific topics included:

- 12
- The revision of the total LID amount from \$200 million to \$160 million and funding plan to address the additional \$40 million not covered by the LID;
 - Friends' new funding commitment, contribution schedule, and due date for Fundraising Plan;
 - O&M framework, pilot agreement, long-term agreement, budget, and Oversight Committee;
 - LID Protest Waiver Agreement commitments from City and property owners.
- 13
14

15

Meeting Date	Councilmember
1/17/2019	CM Gonzalez
1/15/2019	CM Mosqueda
1/11/2019	CM Johnson
1/11/2019	CM O'Brien
1/8/2019	CM Juarez
12/28/2018	CM Bagshaw

16
17

18 The City Council disclosed just one documents from these ex parte communications that
19 consisted of one affected property owner's objection to the Waterfront LID.⁴⁴ Then, only one
20 day before the final vote, attorney Jack McCullough sent an email to some affected property
21 owners evidencing the City Council's prejudged decision to create the Waterfront LID, and to
22 reduce the assessment from the original \$200 million to \$160 million to prevent a protest by
23 certain property owners.⁴⁵

24
25 _____
⁴² *Id.*

26 ⁴³ *Id.*, Attachment 2.

27 ⁴⁴ *Id.*

⁴⁵ *Decl. Franklin*, Ex. 1.

1 This email said:⁴⁶

2 From: Jack McCullough <jack@mhseattle.com>
3 Date: January 27, 2019 at 12:28:49 PM PST
4 To: Jack McCullough <jack@mhseattle.com>
5 Cc: Alex Brenner <abrenner@mhseattle.com>
6 Subject: Waterfront LID Update

7 Here is an update on the LID:

- 8
- 9 • The City Council is scheduled to vote on the ordinances on Monday. It appears that we have the
10 necessary favorable votes and that the Council will not be monkeying with the deal.

11 Plaintiffs are still seeking the details about what specific communication occurred with City
12 Council members behind closed doors to count their votes,⁴⁷ but it is obvious that more ex parte
13 violations transpired, involving all Councilmembers.

- 14 I. The City Council cut off public comment at the January 28, 2019 Formation
15 Ordinance hearing prior to disclosure of even more ex parte violations and did
16 not reopen it.

17 On January 28, 2019, only one business day after the Ex Parte Memo was disclosed, the
18 full City Council voted to form the Waterfront LID.⁴⁸ Plaintiffs objected during the proceedings
19 and requested that the City Councilmembers recuse themselves as a result of the ex parte
20 violations.⁴⁹ Council Central Staff read Plaintiff Ted Tanase's objections⁵⁰ into the record:

21 Ladies and Gentlemen,
22 I recently reviewed the following document which shows violations to the ex-
23 parte communication limitation of the
24 LID: [http://seattle.legistar.com/View.ashx?M=F&ID=7005885&GUID=FEB1E
26 BE6-5D09-4BB0-8B27-60907E88512A](http://seattle.legistar.com/View.ashx?M=F&ID=7005885&GUID=FEB1E
25 BE6-5D09-4BB0-8B27-60907E88512A).
27 **Based on this violation, I request that the City Council members who had**
ex-parte communications immediately disqualify themselves from LID
discussions and voting. The two members not mentioned in the article are
Harrell and Herbold; therefore they are permitted to participate.

Two points:

28 ⁴⁶ *Id.*

29 ⁴⁷ *Id.*, Ex. 2.

30 ⁴⁸ *Decl. Lance*, Ex. 1.

31 ⁴⁹ *Decl. Franklin*, Exs. 4 and Ex. 5.

32 ⁵⁰ *Id.*, Ex. 5.

1 1. It is illegal and irresponsible for Council members to receive lobbying from
2 the City (Office of the Waterfront) but not from property owners included in the
3 LID.

4 2. If I had been allowed to lobby the Council members, I would have made these
5 two points:

6 a. From the perspective of the city, this deal is the worst of all worlds. While
7 they get \$160 million of LID money, they legally obligate the city to build what
8 is now estimated to be an almost \$1 billion park. They handcuff themselves and
9 future city budget priorities as they cannot significantly deviate from the design
10 upon which the special benefit assessment was based. By using a LID, they
11 cannot reprioritize or downsize. They are on the hook to finish it as designed,
12 regardless of cost. There are already a lot of iffy sources for the money, and any
13 budget overruns haven't yet been taken into account. It will crush future
14 budgets

15 b. The \$160 million in LID funds can/should be raised by alternative means;
16 for example, Naming rights for the Waterfront and/or Park (similar to what T-
17 Mobile has completed for the baseball park), landing fees for cruise ships, one-
18 time fees for new buildings constructed in the LID area, one-time fees for new
19 businesses starting in the LID area, Sunday parking fees, small (2-1/2%) increase
20 in private parking fees, etc.

21 Respectfully,
22 Ted Tanase

23 No one recused themselves. Councilmembers were instructed on the record that "the
24 cure [for ex parte violations] is disclosure,"⁵¹ and they were briefed on the Appearance of
25 Fairness Doctrine "for those folks who [we] are not familiar with it."⁵² President Harrell
26 provided Councilmembers with an internal June 8, 2015, Memorandum by Martha Lester "that
27 cites the Appearance of Fairness Doctrine," because he "[did]n't think anyone else ha[d] it."⁵³
Yet, before allowing Councilmembers to disclose their ex parte violations,⁵⁴ President Harrell
set aside the ex parte issues and proceeded to public comment.⁵⁵ He stated, "Sorry to bore
everyone with that technicality, but we are going to move to public comment now."⁵⁶ President
Harrell planned a set number of minutes for public comment and ran over time.⁵⁷ Thereafter,

⁵¹ *Decl. Werner*, Ex. 2, p. 4.

⁵² *Id.*, p. 3.

⁵³ *Id.*, p. 6; Ex. 1, p. 5.

⁵⁴ *Id.*, Ex. 2, p. 4.

⁵⁵ *Id.*, p. 9.

⁵⁶ *Id.*, p. 7.

⁵⁷ *Id.*, p. 9.

1 comments were limited to only one minute.⁵⁸ In objection, a constituent commented: “I think
2 that is a breach of contract Bruce Harrell against the people. We pay you.”⁵⁹ President Harrell
3 threatened to have someone removed because he was “disruptive” and further encouraged him
4 to “just chill for a minute.”⁶⁰

5 J. Three downtown residential condominium owners objected in person to the
6 Waterfront LID.

7 During the short public comment, “Karen” testified that she “will pay more than the
8 value of a years’ worth of property taxes.”⁶¹ She asked each Councilmember “to consider how
9 the voters in their district would feel if the rest of the Council decided to tax you and only you
10 for a project meant to benefit the entire city.”⁶² “The issues of affordability and unfairness of
11 penalizing downtown residents were never addressed.” In addition, she reminded them that as
12 they considered their ex parte disclosures:

13 The deal made with as few as 100 of the large downtown property owners . . .
14 make up a majority of the value of the LID property but are less than two percent
15 of the actual property owners. By making this deal you have blocked all other
16 property owners including 4600 condo owners from having a voice in the
17 decision. Renters and business tenants were never even considered in the
18 process.⁶³

19 Next, “Robin” testified that,

20 This Seattle Waterfront LID is an unwanted levy of involuntary taxes against a
21 minority of downtown condo owners . . . , [and] directly after you approved the
22 start of the LID, sales have gone downhill for prices for my “small retirement
23 condo three blocks from the freeway, far from the waterfront that I bought many
24 years ago to afford Seattle after 37 years of being a Seattleite. Your LID has
25 forced me to search for a lower cost . . . more welcoming place to live in
26 Nevada, Texas, even outside the USA or even considering doing the mobile
27 camper tent situation. I will be forced to move out and either charge the high rent
necessary or otherwise sell my small old condo. . . . Please finally listen. . . .

24 ⁵⁸ *Id.*

25 ⁵⁹ *Id.*

26 ⁶⁰ *Id.*

27 ⁶¹ *Id.*, p. 7.

⁶² *Id.*

⁶³ *Id.*, pp. 7-8.

1 [T]he unfair LID that is levying this unwanted tax across a wide swath of a small
2 number of downtown condo owners such as myself.⁶⁴

3 Plaintiff Debra Cohen asked the City Council to tax the new cruise ships coming to the Central
4 Waterfront.⁶⁵

5 Thereafter, President Harrell concluded public comment stating,

6 We are going to conclude public comment, we extended it once again so we had
7 some speakers that didn't make it and we didn't make it because we ran out of
8 time we have to get on with our agenda. We are proceeding and I'm sorry we
9 couldn't hear your testimony today sir. It's not a conspiracy sir, its my
10 discretionary call. We are going to proceed, if you are going to be disruptive I'm
11 going to have you removed.⁶⁶

12 Thereafter, President Harrell encouraged the clerk to call the next agenda item, stating, "the
13 more we wait the more I have to listen to this."⁶⁷

14 K. After public comment concluded, and before the final vote, Councilmembers
15 revealed even more ex parte violations.

16 Only *after* the public comment period was terminated did President Harrell ask each
17 Councilmember to disclose their ex parte communications and bias on the record.⁶⁸ Six
18 councilmembers disclosed additional ex parte contacts to get "facts"⁶⁹ from interested parties,
19 including legislative staff, the Office of the Waterfront, constituents, and labor organizers.
20 Plaintiffs were and are currently unable to know of, analyze, or rebut these one-sided
21 presentations about the "facts." At the same time, Councilmembers never provided the legally
22 required detail of their ex parte violations.
23

24 Specifically, Councilmember Johnson admitted he received private briefings from the
25 Office of the Waterfront that consisted of "facts" and "technical information that [he] felt was
26 necessary in order to make an informed decision." He also admitted to receiving a complaint
27 about the Waterfront LID from a constituent which he hand wrote and attached to the Ex Parte

24 ⁶⁴ *Id.*, pp. 8-9.

25 ⁶⁵ *Id.*, p. 10.

26 ⁶⁶ *Id.*

27 ⁶⁷ *Id.*

⁶⁸ *Id.*, Ex. 1, p. 18.

⁶⁹ *Id.*, Ex. 2, pp. 12-14 and 16.

1 Memo.⁷⁰ Councilmember Johnson also admitted to meeting with legal counsel and staff about
2 the ex parte violations prior to the hearing.⁷¹ Councilmember Bagshaw admitted that “like
3 Council Member Johnson” she was “briefed by our city staff,” and she received “a number of “
4 emails,⁷² but unlike Councilmember Johnson the Bagshaw emails were never attached to the
5 Ex Parte Memo or otherwise disclosed. And Councilmember O’Brien stated that “similar to the
6 first point that Council Member Johnson made, I did take meetings with city staff,” and “was
7 gathering information and asking questions,” but the substance of the questions and information
8 were never disclosed.⁷³ Councilmember Sawant admitted that her legislative “staff” had
9 meetings with the Office of the Waterfront.⁷⁴ Councilmember Mosqueda admitted that she had
10 ex parte “conversations relating to aspects of [her] support for the legislation to include
11 language around inclusive representation across the City on the Board, the role labor should
12 have, [and] the ability to have childcare subsidies for those who are serving on the Board.”⁷⁵
13 She asserted that none of the conversations related to the preliminary assessments. Rather, it
14 was communications she “had with members of the community because [she] is a labor
15 advocate.”⁷⁶ Councilmember Juarez denied having private meetings, then she reversed and
16 stated she “had meetings with city staff regarding just the facts.”⁷⁷ Councilmembers Herbold
17 and Harrell disclosed no ex parte communications in the Ex Parte Memo or at the hearing prior
18 to the vote. Councilmember Gonzalez was absent and did not vote on the Waterfront LID.

19 These meager disclosures provided no substance and left Plaintiffs and the other
20 affected property owners no opportunity to know of, analyze, or rebut the violations. City
21 Councilmembers then stated the purpose of the Waterfront LID Formation ordinance was “to
22 serve all of Seattle” a “shared waterfront.” The Waterfront LID was declared to be a

23 ⁷⁰ *Id.*, pp. 12-13.

24 ⁷¹ *Id.*

25 ⁷² *Id.*, pp. 13-14.

26 ⁷³ *Id.*, p. 14.

27 ⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*, p. 15.

⁷⁷ *Id.*, p. 16.

1 “regional,” and “national and international” asset that creates “union jobs.” Thereafter the City
2 Council voted to approve the Waterfront LID Formation Ordinance, 8-0.

3 L. More ex parte violations are disclosed only after discovery.

4 Plaintiffs brought suit for, among other things, Violation of the Appearance of Fairness
5 Doctrine.⁷⁸ To date, discovery is ongoing, and already Plaintiffs have discovered several more
6 ex parte violations not disclosed on the record or included in the Ex Parte Memo. In addition to
7 the 14 ex parte meetings disclosed by the City Council one business day before the hearing, and
8 the McCullough email evidencing another nine or more ex parte meetings, the following ex
9 parte communications were never disclosed:

- 10 1. On July 24, 2018, Office of the Waterfront staff met ex parte with City
11 Councilmembers Juarez and Bagshaw in Councilmember Bagshaw’s office.⁷⁹

12 **CM Bagshaw/CM Juarez: LID and O&M briefing**

13 **Where:** CM Bagshaw's office
14 **When:** Tue Jul 24 12:30:00 2018 (America/New_York)
15 **Until:** Tue Jul 24 13:15:00 2018 (America/New_York)
16 **Organiser** "Foster, Marshall" </o=exchangelabs/ou=exchange administrative group
17 **s** (fydibohf23spdlt)/cn=recipients/cn=3cc24c9136dc4013abed4aefe184bdd3-fosterm">
18 **Required** "Curtis, Joshua" <joshua.curtis@seattle.gov>
19 **Attendees:** "Costa, Dorinda" <dorinda.costa@seattle.gov>
20 "Tebeau, Lena" <lena.tebeau@seattle.gov>
21 "Emsky, Tyler" <tyler.emsky@seattle.gov>
22 "Bagshaw, Sally" <sally.bagshaw@seattle.gov>
23 "Juarez, Debora" <debora.juarez@seattle.gov>
24 "Foster, Marshall" <marshall.foster@seattle.gov>

- 25 2. On August 15, 2018, Councilmember O’Brien received a “Waterfront LID and
26 O & M Briefing.”⁸⁰
27 3. On August 31, 2018, the Seattle Hearing Examiner solicited City Clerk Monica
Simmons’s “review” of his draft report and offered to “update/modify the report
prior to submittal to Council,” which email was then forwarded to the Office of
the Waterfront and Department of Finance and Administrative Services.⁸¹

⁷⁸ Residents Amended Complaint, Section 5.8; Commercial Second Amended Complaint, Section 5.5.

⁷⁹ *Decl. Lance*, Exs. 14 and 15.

⁸⁰ *Id.*, Ex. 16.

⁸¹ *Id.*, Ex. 17.

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From: Vancil, Ryan
Sent: Friday, August 31, 2018 8:45 AM
To: Simmons, Monica M <Monica.Simmons@seattle.gov>
Cc: Samuels, Jennifer <Jennifer.Samuels@seattle.gov>
Subject: LID report scan

Monica – Please see attached a scan of the LID Hearing Examiner Report. The Report references “Attachment A” the comments. I am assuming those will be included with the copy of the report submitted to Council and have not included the Attachment/comments here. Please feel free to review, and if there are any comments questions following this I am happy to update/modify the report prior to submittal to Council if necessary. Thank your incredible efforts, and the efforts of your team in this process.



Ryan Vancil
Hearing Examiner

RE: Hearing Examiner's Report

From: "Foster, Marshall" <marshall.foster@seattle.gov>
To: "Curtis, Joshua" <joshua.curtis@seattle.gov>, "Costa, Dorinda" <dorinda.costa@seattle.gov>
Date: Wed, 05 Sep 2018 14:37:09 -0700

Thanks. I read it. Looks pretty fair and reasonable!

From: Curtis, Joshua
Sent: Wednesday, September 5, 2018 12:04 PM
To: Foster, Marshall <Marshall.Foster@seattle.gov>; Costa, Dorinda <Dorinda.Costa@seattle.gov>
Subject: FW: Hearing Examiner's Report

Here's the hearing examiner report. Am going to print out and review on my vacation for some fun reading.

4. On September 10, 2019, at Councilmember Juarez's request, Office of the Waterfront Director Marshall Foster met ex parte with Councilmember Juarez to discuss the Hearing Examiner LID Report.⁸²
5. On September 18, 2018, Councilmember Juarez staff rejected a meeting with a constituent regarding the Waterfront LID.⁸³
6. On September 19, 2018, Office of the Waterfront staff Joshua Curtis planned to brief Councilmember Juarez regarding "O & M."⁸⁴

⁸² *Id.*, Ex. 18.

⁸³ *Id.*, Ex. 19.

⁸⁴ *Id.*, Ex. 20.

7. On November 7, 2018, staff members from the Office of the Waterfront met ex parte with Councilmember Juarez.⁸⁵

Meeting Forward Notification: CM Juarez: Waterfront LID+O&M legislation briefing

Where: CM Jaurez's office
When: Wed Nov 07 17:00:00 2018 (America/New_York)
Until: Wed Nov 07 17:45:00 2018 (America/New_York)
Organisers "McConaghy, Eric" </o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=f4eeab8ff7564082baa957f2dfa2bda1-mcconae">
Required Attendees: "Foster, Marshall" <marshall.foster@seattle.gov>

8. On November 15, 2018, Councilmember Harrell received an ex parte briefing on the "Waterfront LID+O&M legislation."⁸⁶
9. On December 3, 2018, the City Council planned a briefing regarding the "LID O&M."⁸⁷
10. On January 7, 2019, the Office of the Waterfront circulated to the City Council ex parte its LID presentation.⁸⁸

From: Ratzliff, Traci <Traci.Ratzliff@seattle.gov>
Sent: Monday, January 07, 2019 4:39 PM
To: Kamkar, Negheen <Negheen.Kamkar@seattle.gov>; McConaghy, Eric <Eric.McConaghy@seattle.gov>
Subject: RE: Draft LID presentation

o.k. we will look at it and get it back to you by tomorrow..

TR

11. On January 10, 2019, Councilmember Legislative Assistants all met ex parte to learn from Councilmember Juarez staff and Central Staff "what you (and your CM) need to know on the Waterfront LID."⁸⁹
12. On January 23, 2019, Councilmembers received an ex parte letter of support from Seattle Art Museum Director Kimerly Rorschach.⁹⁰

⁸⁵ *Id.*, Ex. 21.

⁸⁶ *Id.*, Ex. 22.

⁸⁷ *Id.*, Ex. 23.

⁸⁸ *Id.*, Ex. 24.

⁸⁹ *Id.*, Ex. 25.

⁹⁰ *Id.*, Ex. 26.

13. On January 24, 2019, Councilmember Central Staff member Eric McConaghy asked all Legislative Assistants to disclose all ex parte contacts.⁹¹

Many of these actions implicate the state Appearance of Fairness Doctrine. The legislative package includes the following:

C.B. 119447	Waterfront LID formation ordinance
C.B. 119448	Central Waterfront operations and maintenance ordinance
C.B. 119449	Waterfront LID protest waiver agreement ordinance

I am sending to you for your review a memorandum disclosing communications by the Office of the Waterfront and Civic Projects and FOWs with Councilmembers that may be subject to the Appearance of Fairness Doctrine. This memorandum will be attached to the agenda for the Council meeting on Monday, January 28th.

Please, contact me if you wish to disclose communication about the Waterfront legislation that is not represented on the attachment to the memorandum. If you do, then I will revise the memorandum accordingly.

Best regards,

Eric McConaghy
Legislative Analyst

14. Councilmember Bagshaw apparently continues to meet ex parte on Waterfront LID budget issues.⁹²

III. ISSUES PRESENTED

A. Whether the Seattle Hearing Examiner violated the Appearance of Fairness Doctrine and Quasi-Judicial Rules when he privately sought review of and comment on his report from City staff and offered to make changes, but he did not do the same for the hundreds of protesters who participated in the HE Hearings.

B. Whether the Seattle City Council violated the Appearance of Fairness Doctrine when it failed to disclose multiple ex parte violations that occurred during the quasi-judicial process.

C. Whether the Seattle City Council violated the Appearance of Fairness Doctrine when it failed to adequately disclose the “substance” of its ex parte violations.

D. Whether the Seattle City Council violated the Appearance of Fairness Doctrine when it failed to release its Ex Parte Memo in a timely manner and provide an opportunity to know of, analyze, or rebut the ex parte violations.

⁹¹ *Id.*, Ex. 27.

⁹² *Id.*, Exs. 6 and 7.

1 E. Whether the Hearing Examiner, Council Committee, and full City Council
2 violated state LID law and the Quasi-Judicial Rules when they made no written findings,
3 conclusions, and recommendations.

4 F. Whether this Court should invalidate Ordinance 125760, and remand for:

- 5 1. full disclosure of all ex parte communications;
6 2. notice and an opportunity to refute the substance of the ex parte
7 information at a new public hearing before an independent hearing
8 examiner;
9 3. the entry of written findings, conclusions, and recommendations by all
10 reviewers; and
11 4. a new vote on Waterfront LID Ordinance 125760.

12 IV. EVIDENCE RELIED UPON

13 This motion is based on:

- 14 1. Declaration of Jesse O. Franklin and the exhibits attached thereto;
15 2. Declaration of Benjamin W. Lance and the exhibits attached thereto;
16 3. Declaration of Lisa Werner and the exhibits attached thereto;
17 4. Declaration of Larry Ice; and
18 5. All other records and documents on file with the Court in this matter.

19 V. LEGAL AUTHORITY

20 A. The timing, substance, and complete lack of ex parte disclosures violated the
21 Appearance of Fairness Doctrine as a matter of law.

22 Summary judgment is proper when there exists no dispute of material fact, and the
23 moving party is entitled to judgment as a matter of law. *Keck v. Collins*, 184 Wn.2d 358, 370,
24 357 P.3d 1980 (2015). Here, there is no dispute that the City Council : (1) prejudged the
25 outcome of the Waterfront LID vote due to budget issues; (2) failed to disclose a number of ex
26 parte violations; (3) inadequately disclosed the ex parte violations it did reveal; and (4) failed to
27 provide an opportunity to rebut the ex parte violations. The City Council's vote to form the

1 Waterfront LID violated the Appearance of Fairness Doctrine as a matter of law, and Ordinance
2 125760 should be invalidated.

3 B. Quasi-Judicial action must be free from actual bias and the appearance of bias.

4 Quasi-judicial action must be free from both actual bias and the appearance of bias.

5 *Clausing v. State*, 90 Wn. App. 863, 955 P.2d 394 (1998). Specifically, *Chrobuck v. Snohomish*
6 *Cty.*, holds quasi-judicial actions must:

7 [B]e scrutinized with care and with the view that the evil sought to be remedied
8 lies not only in the elimination of actual bias, prejudice, improper influence or
9 favoritism, but also in the curbing of conditions which... tend to create
suspicion, generate misinterpretation, and cast a pall of partiality, impropriety,
conflict of interest or prejudgment over the proceedings to which they relate.

10 78 Wash.2d 858, 868, 480 P.2d 489 (1971) (emphasis added). Actions that create an appearance
11 of bias, improper influence, and/or prejudgment are invalid as a matter of law. *Olympic*
12 *Healthcare Services II LLC v. Dept. of Social and Health Servs.*, 175 Wn. App. 174, 185, 304
13 P.3d 491 (2013).

14 C. Evidence of prejudgment violates the Appearance of Fairness Doctrine.

15 The Appearance of Fairness Doctrine invalidates any quasi-judicial action that appears
16 to be prejudged. *Clausing*, 90 Wn. App. at 876. After spending \$30 million of Waterfront LID
17 funds since 2011, the City Council had no choice but to approve the Waterfront LID or solve a
18 \$30 million budget deficit. With so much pressure, not surprisingly, the City Council approved
19 the Waterfront LID despite a troubling appraiser report, no designs, construction documents or
20 budgets, and a “poor” overall design for pedestrians (due to the eight-lane surface roadway).⁹³
21 Psychologists sometimes refer to the phenomena as “escalation bias” where “negative
22 consequences may actually cause decision makers to increase commitment of resources and
23 undergo the risk of further negative consequences.”⁹⁴ This phenomena is clearly acted out in the
24 City Council’s commitment to spending against the Waterfront LID, and continued actions to
25 approve it. As a consequence, the decision to form the Waterfront LID was prejudged for years

26 ⁹³ *Decl. Lance*, Ex. 28.

27 ⁹⁴ <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.470.3668&rep=rep1&type=pdf>

1 and violates the Appearance of Fairness Doctrine, as did this celebration by the Waterfront
2 LID's sponsor, Councilmember Juarez after the vote:⁹⁵



7 D. The nondisclosure of numerous ex parte communications violated the
8 Appearance of Fairness Doctrine.

9 During a quasi-judicial matter, ex parte contacts are forbidden. RCW § 42.36.060;
10 Quasi-Judicial Rules § III.A. An ex parte contact is any communication between a decision-
11 maker and opponents or proponents of the proposal, about the proposal, and “outside of a
12 Council hearing or meeting.” RCW § 42.36.060 (“During the pendency of any quasi-judicial
13 proceeding, no member of a decision-making body may engage in ex parte communications
14 with opponents or proponents with respect to the proposal which is the subject of that
15 proceeding...”); Quasi-Judicial Rules § II.E.⁹⁶ Should a member engage in ex parte contacts,
16 that member must: (1) place “in the procedural record” the “substance of any ex parte
17 communications”; and (2) “make a public announcement” of the “substance of each
18 communication” at each subsequent hearing, and provide interested parties the opportunity to
19 refute the communications. RCW § 42.36.060; Quasi-Judicial Rules § III.B. Under the
20 Appearance of Fairness Doctrine, undisclosed ex parte communications may invalidate the
21 action taken by the City Council. *Organization to Preserve Agricultural Lands v. Adams Cty.*,
22 128 Wn.2d 869, 886-87, 913 P.3d 793 (1993); *West Main Associates v. City of Bellevue*, 49 Wn.
App. 513, 528-29, 742 P.2d 1266 (1987).

23 On Friday January 25, 2019, just one business day before the Waterfront LID vote, the
24 City released its Ex Parte Memo.⁹⁷ The Ex Parte Memo disclosed 14 private meetings with
25

26 ⁹⁵ <http://www.seattlechannel.org/FullCouncil?videoid=x101756> at elapsed time 1:56:16.

27 ⁹⁶ *Decl. Lance*, Ex. 11, Quasi-Judicial Rules §§ II.E and III.A.

⁹⁷ *Decl. Lance*, Ex. 13.

1 Councilmembers, Friends of the Waterfront, and Office of the Waterfront staff, but just seven
2 public meetings with the City Council.⁹⁸ Then, on the Sunday before the Monday vote, attorney
3 Jack McCullough revealed at least nine additional ex parte violations, where the
4 Councilmembers all communicated behind closed doors to approve the Waterfront LID.⁹⁹ These
5 ex parte violations are not contained in the Ex Parte Memo and were never disclosed by the City
6 Council. Subsequently, on the day of the vote, after public comment was cut off, and without
7 opportunity to respond whatsoever, Councilmembers admitted to more ex parte
8 communications with staff, key constituents, and others where they received a one-sided version
9 of the “facts” over and over again.¹⁰⁰

10 With formal discovery in this matter still incomplete, even a cursory review of
11 Defendant’s document production evidences at least 14 undisclosed ex parte violations.¹⁰¹
12 *Supra*, pp. 19-21. Here, Councilmember meetings with the Office of the Waterfront are
13 specifically about the Waterfront LID and labelled as “RE: LID,” as was the Hearing
14 Examiner’s ex parte violation. These violations related to the Waterfront LID and were never
15 disclosed. These undisclosed ex parte violations require the Court to invalidate Ordinance
16 125760.

17 In addition to the undisclosed number of ex parte violations, the number of ex parte
18 meetings compared to the public meetings is simply unconscionable. The City Council admitted
19 to 14 violations in the Ex Parte Memo, plus nine or more violations were revealed by the
20 McCullough email, and plus 14 more ex parte violations found to date during discovery. This
21 means the City Council had as many as 37 or more ex parte meetings, compared to just the
22 seven public meetings. More than five times the amount of private meetings occurred versus
23 public meetings, leaving Plaintiffs with no opportunity to fairly and concretely rebut any private
24 conversations. As a result, the City Council violated the Appearance of Fairness Doctrine.

25 _____
⁹⁸ *Id.*

26 ⁹⁹ *Decl. Franklin*, Ex. 1.

¹⁰⁰ *Decl. Werner*, Ex. 2, pp. 11-16.

27 ¹⁰¹ *Decl. Lance*, Exs. 14-27.

1 E. The disclosure contained insufficient information and did not satisfy the
2 Appearance of Fairness Doctrine.

3 The “cure for [ex parte communications] is disclosure.”¹⁰² And proper disclosure
4 requires that the decision-maker place the “substance” of the ex-parte communications on the
5 record. *Organization to Preserve Agricultural Lands* 128 Wn.2d at 887. Under RCW
6 § 42.36.060, a quasi-judicial body may cure its ex parte violations when it: “(1) [p]laces on the
7 record the substance of any written or oral ex parte communications concerning the decision of
8 action; and (2) [p]rovides a public announcement of the content of the communication and of
9 the parties’ rights to rebut the substance of the communication . . . at each hearing where action
10 is considered.” RCW § 42.36.060 (emphasis added.); Quasi-Judicial Rules § III.B. The purpose
11 of this requirement is to provide the affected parties equal access to the decision-maker, and an
12 opportunity to rebut the ex parte communication. *Organization to Preserve Agricultural Lands*
13 *v. Adams Cty.*, 128 Wn.2d at 890 (requiring that the “substance” of ex-parte communications be
14 disclosed). The City Council’s disclosure statement does not provide a fair opportunity for
15 Plaintiffs to rebut discussions because: (i) the topics disclosed lack “substance” and any
16 meaningful detail; and (ii) the City Council’s last-minute Ex Parte Memo, along with the brief
17 oral disclosure of more ex parte violators *after* public comment, prevented Plaintiffs from
18 knowing, analyzing, and rebutting the ex parte violations.

18 F. The City’s disclosures lacked “substance.”

19 Specifically, the Ex Parte Memo reveals 14 private discussions held ex parte between
20 the Office of the Waterfront and Councilmembers. And while the disclosure provides the *topic*
21 of the discussion, it does not provide the “substance.” Lacking in the City’s disclosure includes:
22 the individuals present, any material used or created as part of the ex parte violations about the
23 “facts,” and the actual “facts” that the City Councilmembers admitted they gathered during the
24 ex parte communications.¹⁰³ Without more detail, property owners and other interested parties
25 cannot meaningfully rebut the ex parte violation.

26 ¹⁰² *Decl. Werner*, Ex. 2, p. 5.

27 ¹⁰³ *Decl. Werner*, Ex. 2, pp. 12-14 and 16.

1 For example, in creating a local improvement district for public spaces, there is no
2 special benefit if the area is not “properly kept and maintained.” *Heavens*, 66 Wn.2d at 566. But
3 it is impossible to rebut a private conversation about the “City’s operations and management
4 plans and capital costs”¹⁰⁴ without more information about the area to be maintained, the level
5 of maintenance, and the financial needs of such maintenance. In addition, the purpose of the ex
6 parte disclosures is to allow interested parties to rebut the one-sided “facts” presented ex parte, a
7 necessary component of such disclosure must be the identity of the individuals that presented
8 the ex parte facts, along with all the materials related to the ex parte communication.

9 Similarly, the last-minute email from Jack McCullough and additional oral disclosures at
10 the end of Formation Ordinance hearing did not provide any “substance” that would allow
11 Plaintiffs to know of, analyze, or rebut the ex parte communications. For example,
12 Councilmember Bagshaw admitted to receiving “a number of emails” that were not placed on
13 the record.¹⁰⁵ Councilmembers admitted to briefings on the “facts,” and yet none of those
14 “facts” were placed on the record.¹⁰⁶ The City Council’s disclosures evade the purpose and
15 requirements of the Appearance of Fairness Doctrine and Quasi-Judicial Rules, and the City
16 denied property owners of their right to notice and an opportunity to be heard. These actions are
17 unlawful and unfair. As a result, the City Council’s actions violated the Appearance of Fairness
18 Doctrine, and this Court should invalidate Ordinance 125760.

19 G. The City Council’s late disclosure and refusal to allow comment prevented any
20 rebuttal.

21 The last-minute disclosures violate the Appearance of Fairness Doctrine because
22 Plaintiffs had no time to adequately learn of, analyze, or rebut the violations. On January 25,
23 2019, just one business day before the LID vote, the City released its Ex Parte Memo.¹⁰⁷
24 Evidence of additional ex-parte violations surfaced in the McCullough email just one day before

25 ¹⁰⁴ *Decl. Lance*, Ex. 13.

26 ¹⁰⁵ *Decl. Werner*, Ex. 2, pp. 13-14.

27 ¹⁰⁶ *Id.*, pp. 12-14 and 16.

¹⁰⁷ *Decl. Lance*, Ex. 13, p. 1.

1 the vote.¹⁰⁸ More concerning, however, were the several constituent emails and meetings about
2 the “facts” that came to light after public comment concluded and just before the Waterfront
3 LID Formation Ordinance vote. The timing of the City’s half-hearted disclosure is not
4 consistent with the Appearance of Fairness Doctrine: to provide constituents a meaningful
5 opportunity to rebut the communications. *Organization to Preserve Agricultural Lands v.*
6 *Adams Cty.*, 128 Wn.2d at 890. Nor is it consistent with the Quasi-Judicial Rules, which require
7 notice to affected parties at least 7 day-notice prior to any meeting on the matter. QJ Rules
8 § VI.B. Plaintiffs, and the general public, were not provided with adequate time to know of,
9 analyze or rebut the ex parte communications. The insufficient timing of the disclosures also
10 requires this Court to invalidate Waterfront LID Ordinance 125760.

11 H. Waterfront LID Ordinance 125760 should be invalidated and remanded to the
12 City Council.

13 City Councilmembers can avoid an Appearance of Fairness violation if they take action
14 to neutralize the effects of the violation – for example, removing themselves from the
15 proceeding. *Bjarnson v. Kitsap Cty.*, 78 Wn. App. 840, 848, 899 P.2d 1290 (1995) (holding that
16 no Appearance of Fairness Violation existed when the affected Councilmember removed
17 himself from further proceedings). Unlike *Bjarnson*, the City Council did not neutralize the ex
18 parte violations. Only Councilmember Gonzales did not vote, because she was absent. The six
19 Councilmembers with admitted violations persisted in forming the Waterfront LID and did not
20 even allow comment. The City Councilmember’s failure to recuse themselves did not cure the
21 ex parte violations.

22 In addition, where the totality of the circumstances demonstrates an appearance of
23 unfairness, the actions violate the Appearance of Fairness Doctrine. *Chrobuck v. Snohomish*
24 *Cty.*, 78 Wn.2d 858, 870, 480 P.2d 489 (1971) (“[W]e...are driven to the conclusion that the
25 unfortunate combination of circumstances heretofore outlined and the cumulative impact
26 thereof inescapably cast an aura of improper influence, partiality, and prejudgment over the

27 ¹⁰⁸ *Decl. Franklin*, Ex. 1.

1 proceedings thereby creating and erecting the appearance of unfairness...). Here, the City
2 Council held over five times as many private meetings as it did public meetings; the Hearing
3 Examiner committed ex parte violations; and the City Council prejudged the Waterfront LID for
4 years, and then cut a backroom deal with Jack McCullough to reduce the Waterfront LID from
5 \$200 million to \$160 million, preventing a successful protest by property owners. As evidenced
6 by Councilmember Johnson's admissions to meetings the day of the vote,¹⁰⁹ the City Council's
7 ex parte contacts continued to occur up until the January 28, 2019 Formation Ordinance
8 hearing, and today Councilmember Bagshaw apparently continues to be meeting ex parte on the
9 Waterfront LID during the budget process.¹¹⁰ Without providing property owners, constituents,
10 the general public, and media with an opportunity to meaningfully rebut the ongoing and
11 pervasive ex parte violations, the City Council's quasi-judicial vote is void.

12 I. The City Council's Failure to follow its own Quasi-Judicial Rules violated the
13 Appearance of Fairness Doctrine.

14 In addition to the above ex parte violations, the City's failure to follow other specific
15 procedures within state LID law and the Quasi-Judicial Rules, violated the Appearance of
16 Fairness Doctrine. The Quasi-Judicial Rules implement the Appearance of Fairness Doctrine.
17 QJ Rules, § I ("The purpose of these rules is to establish procedures for quasi-judicial actions
18 before the Council and to implement the Appearance of Fairness Doctrine."). Specifically, the
19 Hearing Examiner, the Council Committee, and the full City Council (i) failed to create findings
20 of fact, conclusions of law, and recommendations, and (ii) failed to provide mailed notice to
21 affected property owners, including Plaintiffs.

22 1. The Hearing Examiner, City Council Committee, and full City
23 Council did not create Findings, Conclusions, and Recommendations
24 as required.

25 Pursuant to state LID law, the Hearing Examiner is required to "report
26

27 ¹⁰⁹ Decl. Werner, Ex. 2, pp. 12-13.

¹¹⁰ Decl. Lance, Exs. 6 and 7.

1 recommendations” for the proposed local improvement district to the City Council.¹¹¹ This
2 report is then referred to the Council Committee for review and adoption of findings,
3 conclusions, and a recommendation to the full City Council. Under City Council’s Quasi-
4 Judicial Rules § VII.A, “after the committee votes on a recommendation, Council staff shall
5 prepare proposed findings of fact and conclusions of law and a proposed decision for Council
6 based on the committee’s recommendation.”¹¹² And then the full City Council “shall adopt
7 written findings of fact and conclusions to support its decision.”¹¹³ Following that, the City
8 Council sends the findings, conclusions, and decisions to the property owners and other
9 interested parties.¹¹⁴

10 Here, the Hearing Examiner failed to “report recommendations” from the City Council
11 Resolution of Intent to form the Waterfront LID, instead just choosing to pass public comments
12 through to the City Council Committee. Once the Hearing Examiner LID Report was referred to
13 the Council Committee, the Council Committee never made written findings and conclusions
14 recommending the Waterfront LID to the full City Council. And the full City Council never
15 adopted any written findings and conclusions in support of its decision and vote to form the
16 Waterfront LID. By rushing the applicable procedure, it becomes clear that the City Council
17 violated the Appearance of Fairness Doctrine, and this Court should remand this matter back.

18 2. Notice was never provided to affected property owners.

19 The City is required to mail notice of the HE Hearings to all affected property owners
20 “at least 15 days” before the hearings. RCW § 35.43.150. In addition, the Quasi-Judicial Rules
21 state: “Council staff shall mail notice of the committee meetings(s) at which the quasi-judicial
22 action is considered to the parties of record . . . at least twenty-one (21) calendar days prior to
23 the first meeting[,], and at least seven (7) calendar days prior to any subsequent meeting.”¹¹⁵
24

25 ¹¹¹ RCW § 35.43.140.

26 ¹¹² QJ Rules § VII.A.

27 ¹¹³ QJ Rules § VIII.D.

¹¹⁴ QJ Rules §§ VIII.D and IXA.1.

¹¹⁵ QS Rules § IV.B.1-2.

1 Affected property owners never got notice of the Hearing Examiner's July 2018 Public
2 Hearings,¹¹⁶ let alone the subsequent City Council Committee, as well as full City Council
3 hearings and meetings discussing the Waterfront LID. As a result, the City violated state LID
4 law and the Appearance of Fairness Doctrine, and this Court should invalidate Ordinance
5 125760.

6 J. This Court should invalidate Waterfront LID Ordinance 125760 and remand to
7 the City Council.

8 Quite honestly, the City Council made a half-hearted attempt to neutralize the ex parte
9 violations pertaining to the Waterfront LID vote and did so in a manner to avoid sharing the
10 pertinent facts with Plaintiffs - all to the detriment of the thousands of affected property owners.
11 Whether it was prejudging the Waterfront LID for years by promising itself it would finance a
12 growing \$30 million budget deficit, failing to disclose multiple ex parte violations, having over
13 five times more ex parte meetings than public meetings, inadequately describing the
14 "substance" of the ex parte violations, failing to provide an opportunity to rebut the ex parte
15 violations, and refusing to follow the procedures for handling an LID and quasi-judicial action
16 by failing to make findings, conclusions, and report recommendations at each step in the
17 process, the City Council's failure to abide by the Appearance of Fairness Doctrine and Quasi-
18 Judicial Rules obliterated any appearance of fairness.

19 VI. CONCLUSION

20 Democracy dies in the dark, and it is time to daylight the Waterfront LID. Plaintiffs
21 were left in the dark about numerous ex parte violations, intentionally prohibited from
22 communicating with the City Council, and not presented with an opportunity to know of,
23 analyze, or rebut important ex parte communications about the "facts." Ironically, the City
24 Council itself also remained uninformed about the designs, impacts, and the limited amount of
25 special benefits to be conferred. Even more troubling, Councilmembers prejudged the
26 Waterfront LID years before the January 28, 2019 vote by spending Waterfront LID funds long

27 ¹¹⁶ *Decl. Ice.*

1 before they were secured. In 2020, the City Council proposes to increase spending against the
2 Waterfront LID from \$30 million to \$50 million.

3 The City Council intentionally refused tax assessed property owners notice and an
4 opportunity to be heard and violated the Appearance of Fairness Doctrine and Quasi-Judicial
5 Rules. As a result, the vote taken at the January 28, 2019 Formation Hearing must be voided.
6 Plaintiffs request this Court invalidate Waterfront LID Ordinance 125760, remand to the Seattle
7 City Council to prepare an updated ex parte disclosure memorandum, conduct a new public
8 hearing before an independent Hearing Examiner, and perform a new vote as to whether to form
9 the Waterfront LID.

10
11 I certify that this memorandum contains 8,276 words or less, in compliance with the
12 Local Civil Rules.

13 DATED this 29th day of October, 2019.

14 SCHLEMLEIN FICK & SCRUGGS, PLLC

15
16 By: /s/ Jesse O. Franklin IV
17 Jesse O. Franklin IV, WSBA # 13755
18 Garth A. Schlemlein, WSBA # 13637
19 Attorneys for Plaintiffs
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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF

255 SOUTH KING STREET
LIMITED PARTNERSHIP, a
Washington limited partnership; 618
SECOND AVENUE LIMITED
PARTNERSHIP, a Washington limited
partnership; 1000 1ST AVENUE
LIMITED PARTNERSHIP, a
Washington limited partnership; and
1016 1ST AVENUE LIMITED
PARTNERSHIP, a Washington limited
partnership,

Plaintiffs,

vs.

CITY OF SEATTLE, a Washington
municipal corporation,

Defendant.

EUGENE A. BURRUS and LEAH S.
BURRUS, husband and wife and the
marital community comprised thereof;
WILLIAM J. JUSTEN and SANDRA L.
JUSTEN, husband and wife and the
marital community comprised thereof;
THEODORE T. TANASE and
PRISCILLA B. TANASE, husband and
wife and the marital community
comprised thereof; DAVID STARR, an
individual; VASANTH PHILOMIN and
KARIN PHILOMIN, husband and wife
and the marital community comprised
thereof; DANIEL TUPPER and

No. 19-2-05733-5 SEA

(Consolidated with No.
19-2-08787-1 SEA)

[PROPOSED]

ORDER GRANTING
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT REGARDING
EX PARTE VIOLATIONS,
VIOLATIONS OF THE
QUASI-JUDICIAL RULES,
AND FAILURE TO PROVIDE
TIMELY NOTICE TO
PROPERTY OWNERS

No. 19-2-08787-1 SEA
(Judge Ken Schubert)

PATRICIA TUPPER, husband and wife and the marital community comprised thereof; JOHN DRINKARD and JANET DRINKARD, husband and wife and the marital community comprised thereof; FRANK KATZ and ELISE KATZ, husband and wife and the marital community comprised thereof; DEBORAH BOGIN COHEN and RICHARD B. OSTERBERG, Trustees of the ZVI Cohen Family Trust; JOHN A. BATES and CAROLYN CORVI, husband and wife and the marital community comprised thereof; HARVEY ALLISON and MEI WENG ALLISON, husband and wife and the marital community comprised thereof; VICTOR C. MOSES and MARY K. MOSES, Trustees under the 2007 Moses Trust; NANCY E. DORN and CAROL A. VERGA, a married couple; ALEXANDER W. BRINDLE, SR., an individual; TOM H. PEYREE and SALLY L. PEYREE, Trustees of The Thomas H. Peyree and Sally L. Peyree Revocable Trust; ANTON P. GIELEN and KAREN N. GIELEN, husband and wife and the marital community comprised thereof; KEITH PAUL KLUGMAN and MAGDERIE KLUGMAN, husband and wife and the marital community comprised thereof; ANDREW P. MARIN and CYNTHIA J. MARIN, Trustees of The Andrew P. Marin and Cynthia J. Marin Family Revocable Trust; DANIEL S. FRIEDMAN and MYRA A. FRIEDMAN, husband and wife and the marital community comprised thereof; HOLLY MORRIS, an individual; and RONALD EVAN WALLACE, an individual,

Plaintiffs,

vs.

CITY OF SEATTLE, a Washington municipal corporation,

Defendant.

1 THIS MATTER came before this Court on the 13th day of December, 2019,
2 upon Plaintiffs' Motion for Partial Summary Judgment Regarding Ex Parte Violations,
3 Violations of the Quasi-Judicial Rules, and Failure to Provide Timely Notice to Property
4 Owners. The Court having considered the record and pleadings filed herein and the
5 arguments of counsel, reviewed the pleadings and papers filed in support of and in
6 response to this motion, including:

7 1. Plaintiffs' Motion for Partial Summary Judgment Regarding Ex Parte Violations,
8 Violations of the Quasi-Judicial Rules, and Failure to Provide Timely Notice to Property
9 Owners;

10 2. Declaration of Larry Ice;

11 3. Declaration of Jesse O. Franklin with exhibits;

12 4. Declaration of Benjamin W. Lance with exhibits;

13 5. Declaration of Lisa R. Werner with exhibits;

14 6. _____;

15 7. _____;

16 8. _____;

17 9. _____;

18 10. _____.

19 The Court, otherwise being fully advised in the premises, finding that Plaintiffs
20 are entitled to judgment as a matter of law, now, therefore, it is hereby

21 ORDERED, ADJUDGED AND DECREED that invalidate Ordinance 125760
22 creating the Waterfront LID is hereby invalid. It is further,

23 ORDERED, ADJUDGED AND DECREED that the Seattle City Council must
24 prepare an updated Appearance of Fairness Memorandum, conduct a new public hearing
25 before an independent Hearing Examiner, and perform a new vote as to whether to form
26 the Waterfront LID no later than _____.
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IT IS SO ORDERED.

DATED this ____ day of December, 2019.

Judge John R. Ruhl
King County Superior Court

Presented by:

SCHLEMLEIN FICK & SCRUGGS, PLLC

By: /s/ Jesse O. Franklin IV
Jesse O. Franklin IV, WSBA # 13755
Garth A. Schlemlein, WSBA # 13637
Attorneys for Plaintiffs